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Supreme Court of the United States

OCTOBER TERM—1946

No. 625.

PETER CALDAROLA (Plaintiff-Appellant in the Court below),

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Defendant,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO. (Defendants-Respondents in the Court below),

Respondents.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

STATEMENT.

This case involves a question of importance to maritime interests in general. Although the particular case concerns a longshoreman who suffered personal injuries, the issue herein concerns equally the owners of damaged cargo, the owners of vessels, bridges, and piers damaged by collision, and the owners of shore property and persons on shore damaged by explosion, etc. The United States is also concerned, inasmuch as it is presently maintaining at least one

proceeding for limitation of its liability in which it alleges that the United States was the owner and operator of the offending vessel, and that its agent had no interest at all in the vessel or her pending freight. See "In the Matter of the Petition of the United States of America as owner of the Steam Tanker *Spring Hill*, etc.," U. S. District Court, Southern District of New York, Docket No. A 137-345.

The petitioner was a longshoreman, who was injured on January 27, 1944, while working on the *S. S. Everagra*, a vessel owned by the United States. R. 47, 22, 309, 337, 355. The respondents are partners doing business under the style, Thor Eckert & Company, R. 354. They were agents of the United States in respect of the *S. S. Everagra*. R. 337. They were appointed such agents by a General Agency Contract, which referred to them as General Agents. R. 337. This contract was the same as the contract involved in the recent case of *Hust* v. *Moore McCormack*, 328 U. S. 707.

Petitioner was employed by Jarka Corporation, stevedores. R. 20. While he was working at a winch at No. 3 hatch, a boom broke and fell. R. 23. Petitioner was struck and injured either by the boom or by the tackle attached to it.

The United States had contracted directly with Jarka Corporation, petitioner's employer, for unloading the vessel. R. 234, Defendant's Exhibit T. This contract contained a provision which read as follows:

> "4. The Administrator shall furnish and maintain in good working order all necessary masts, booms and winches and the necessary steam or power therefor: blocks, ropes for falls, dunnage, and necessary lights on wharves, piers and vessels when lights are required due to darkness; derricks or cranes when required to handle lifts in excess of the vessel's lifting capacity when, in the opinion of the Administrator, heavy lifts cannot satisfactorily be

handled by rigging the vessel therefor." (Defendant's Exhibit T, Part II, Section 4.)

The "Administrator" referred to above was the administrator of the War Shipping Administration.

Furthermore, the United States had also appointed Moore-McCormack Lines as an agent of the United States in respect of the *Everagra*. R. 236. Moore-McCormack Lines was known as a berth agent. R. 236. Pursuant to that agency, Moore-McCormack Lines had arranged with Agwilines to berth the vessel at Agwilines' Pier 34 for the purpose of discharging its cargo. R. 236, 237. Also, pursuant to that agency, Agwilines was instructed to arrange for the stevedoring, and it was by reason of this that Jarka Corporation, already under contract to the United States, was appointed as stevedore to discharge the vessel. R. 237.

The respondents herein, the General Agent, had nothing to do with any of these arrangements.

Petitioner claimed that the boom fell by reason of the negligence of the respondents in failing to perform a duty to him to exercise reasonable care to have the boom in sound condition. Respondents contended that, assuming that petitioner's injuries were caused by the negligence of someone, there was no negligence on the part of the respondents. R. 93, 296, 330. This was by reason of the fact that respondents were not operators of and in control of the vessel. Viewed otherwise, respondents contended that, if petitioner's injuries were caused by the negligence of anyone, they were caused by the negligence of the United States because the United States was the occupier of the premises, and, thus, had the duties which arose from that status.

The trial court charged the jury, as a matter of law, that respondents neither owned, possessed, nor controlled the vessel; had not supplied the boom to the longshoremen for

their use; that the longshoremen, including the petitioner, were not business invitees of respondents, and that respondents did not owe petitioner any duty arising out of such relationship. R. 307, 309, 310.

Petitioner's (plaintiff's) counsel expressly informed the trial court that petitioner's claim "was not based at all upon the *operation* of the vessel. It is based *only* on the duty *that the agent has under the contract* to make, to arrange for repairs, to make inspections and replacements." (Emphasis ours) R. 320. Accordingly, the court charged the jury that "in view of the limited control, as evidenced by the General Agency Agreement", respondents had a duty to the plaintiff "to use reasonable care in inspecting, repairing and replacing, when necessary, the ship's boom so that it would be reasonably fit and safe for the work for which it was intended." R. 307, 312. Respondents excepted to this, and also to the court's refusal to charge that the duties mentioned in the contract were owed only to the United States. R. 326, 332. There was a verdict for the petitioner, from which the respondents appealed to the Appellate Division.

In the Appellate Division petitioner changed his position. He conceded that his proof of respondents' contractual obligation to the United States was not the equivalent of proving a duty of respondents to the petitioner. *Additional papers to the Court of Appeals, p. 10.* He thus recognized that it had been incumbent on him to show that respondents were in control of the boom at the time of the accident. He was thus faced with an inevitable reversal of the judgment.

The reason for this was that the jury's verdict was not based on a finding of control. The jury had been peremptorily instructed that the respondents were not in control. R. 307, 309, 310. Furthermore, if there was no evidence to support a conclusion that respondents controlled the boom,

petitioner was faced with a dismissal of his complaint. And, so, petitioner undertook on appeal to show for the first time that there was evidence in the record which would support such a conclusion of control.

By so doing, the most that he could hope for was to save himself from a dismissal and obtain an opportunity on a new trial to convince a new jury that respondents were in control.

The Appellate Division rejected the trial court's thesis that respondents' access to the vessel for the purpose of inspection and repairs amounted to "control". According to the Appellate Division, it did not amount to control even in a limited sense. It said that the "opportunity and duty" which the respondents "had to order repairs" was "not the equivalent of control or a substitute for control in relation to the public". Respondents merely had "access to the ship and had a contractual duty to the United States * * *". This was not the equivalent of control. 270 A. D. 563.

Accordingly, in the absence of control, the Appellate Division held that there was no duty owing to the petitioner by the respondents to exercise reasonable care. The Appellate Division, therefore, reversed the judgment, both on questions of fact and of law, and dismissed the complaint. *Supplemental additional papers to the Court of Appeals, p. 6.*

The Appellate Division had power to find facts—i.e., to weigh the evidence and to make findings based on its conclusions.

New York Civil Practice Act §608;
Middleton v. *Whitridge,* (1915) 213 N. Y. 499;
Miller v. *Brooklyn Heights R.R. Co.,* 173 A. D. 910.

The only factual issue submitted to the Appellate Division was that of control of the vessel. This issue was raised by respondents' contention that there was no evidence to show that respondents controlled the vessel and petitioner's contention that there was some evidence which showed such control. In so contending, petitioner submitted the evidence on which he relied to such appraisal as the Appellate Division should choose to give it. Accordingly, the Appellate Division's reversal on questions of fact shows that it chose to weigh the evidence and, as a result, found that the respondents were not in control. Furthermore, the Appellate Division's reversal on questions of law shows that it found that there was no evidence to support a different conclusion.

Petitioner thereupon appealed to the Court of Appeals. This appeal was only from the Appellate Division's reversal on questions of law. The Court of Appeals has no power to hear an appeal from a reversal on questions of fact.

New York Constitution, Article 6, §7.

The Court of Appeals affirmed the Appellate Division's reversal on the law, saying: "We are in full agreement with the Appellate Division's conclusions and the reasons therefor, as stated in its opinion." 293 N. Y. 463, at 466.

Therefore, as the case comes to this court, the precise legal question involved is whether the Court of Appeals was correct in affirming the Appellate Division's reversal on questions of law. Since certiorari was granted in this court in respect of the order of the Court of Appeals only, the Appellate Division's reversal on questions of fact is not before this court.

Summary of Argument.

The only possible liability of the respondents for negligence depends on control of the vessel and its appliances at the time of the accident. The control referred to is actual physical possession. Respondent did not have such control. It had only a right of access to the vessel for the purpose of performing the limited services required of it. Pages 8-10. The General Agency Contract stated explicitly that it was the intention of the parties that such control should be reserved to the United States. Pages 10-12. In actual practice, the United States reserved and exercised control. Pages 12-21. There is no evidence to the contrary. Pages 46-51. The prior decisions of this court—*i.e.*, *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 and *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, do not hold to the contrary. Pages 24-35, 35-42. In the *Brady* case, which involved an entirely different contract, this court declined to decide whether the agent of the United States was in control or not. Pages 36-38. The *Hust* case involved only the right of a seaman to sue under a Federal statute, which is not applicable herein. Pages 21-23. Although it did not decide the question of control, the majority of the court said either that the General Agent was not in control or that the United States was the "technical" employer of the crew. Pages 21-23. This case is stronger than the *Hust* case in showing that the General Agent was not in control because of the evidence as to the actual practice of the United States and the General Agent, much of which was not present in the *Hust* case. Pages 12-21.

Argument.

THIS CASE DEPENDS ON CONTROL, *i. e.*, PHYSICAL POSSESSION OF THE VESSEL.

The petitioner was not employed by the respondents. Therefore, respondents did not owe him any duty to exercise care with respect to the vessel and its appliances, unless the vessel and its appliances were in respondent's control.

Even the liability for unseaworthiness, as announced in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, depends on control. Primarily, it is a liability of the owner of a vessel. By extension it may apply in the case of a non-owner—*i.e.*, one to whom the owner has given control by reason of a demise.

The control referred to herein is actual, physical control. As Judge Cardozo said in *Cullings* v. *Goetz*, 256 N. Y. 287, at p. 290:

> "The power of control * * * implies the power and right to admit people to the premises and to exclude people from them".

In a given case either there is such control, or there is not. There is no middle ground.

The right to go on a vessel for one purpose or another may be thought of, figuratively, as involving a "measure of control". But that is not the kind of control that gives rise to the legal duties with which we are concerned herein. Such "measure of control" is no more than access to the vessel, and should be referred to as such. It does not embrace the right to exclude or admit others from or to the vessel.

Thus, the General Agent in the present case had a duty to make inspections of the vessel and to report to the United

States from time to time so that the "United States may satisfy itself that the vessels are being properly maintained." R. 349. Anyone having a duty to inspect and report has an implied right of access to the object which must be inspected. But no right is implied to give or deny access to others. So, in the case of the General Agent.

Moreover, even if the General Agent had failed to perform his duty of making such inspections and reports as the contract required him to make, and there is no proof of this in the present record, the General Agent would not be liable to the petitioner in the absence of proof that the General Agent was in control. From time immemorial it has been held that an agent is not liable to a third person for an omission or neglect of duty in the matter of his agency.

Murray v. *Usher*, 117 N. Y. 542;
Greco v. *Levy*, 257 A. D. 207.

To sustain an action in tort there must be "a duty of care, irrespective of contract".

Moch v. *Rensselaer Water Co.*, 247 N. Y. 160 at 167.

There is a distinction between "launching an instrument for harm and failing to become an instrument of good".

Caldarola v. *Thor Eckert & Co.*, 270 A.D. 563 at 567.

The latter is not actionable unless one has "incurred an obligation of action".

Caldarola v. *Thor Eckert & Co.*, 270 A.D. 563 at 567.

The obligations of the General Agency contract were obligations solely to the United States. If there was any

obligation to the petitioner, it must be found elsewhere. The only source suggested by petitioner is that the General Agent controlled the vessel.

CONTROL AS INDICATED BY THE GENERAL AGENCY CONTRACT.

The General Agency Contract shows clearly that it was the intention of the parties that physical control of the vessel should be reserved to the United States. Likewise, it was their intention that only the business of the vessel should be entrusted to the General Agent.

Thus, on the one hand, the contract provided that the General Agent was appointed as an "agent, and not as an independent contractor, to manage and conduct the business of the vessels assigned to it by the United States from time to time". R. 337. On the other hand, with respect to the vessels themselves, the contract provided:

> "The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel". R. 338.

The master of a vessel has physical control of a vessel by law and independently of any contract. Therefore, the only purpose of this provision was to deny to the General Agent any power to control the master, and, through such control, any power to control the vessel itself.

The agreement of the General Agent that the master should "have and exercise full control" was an agreement that the General Agent should not have any control at all. That is what "full control" necessarily means in an agreement such as this. The United States thus deliberately excluded the General Agent from control of the vessel.

The demarcation between management of a vessel and management of a vessel's business is one of the facts of

the shipping business. Those who had part in making the General Agency Contract were familiar with this fact. The contract which they made reflected this familiarity.

Even to persons not so familiar with the shipping business, it should be obvious that this demarcation exists. A vessel's business includes such activities as the solicitation and the booking of passengers and cargo; the purchase of food, victuals and supplies; the keeping of records; the collection and disbursement of money; making contracts with shore contractors for repairs and maintenance and for the loading and stowage of cargo; making arrangements for the berthing of vessels; management of a pier; and arranging with maritime unions for supplying personnel. These are activities which have no relevance to the actual physical operation of, or dominion over, a vessel. They are all capable of performance, generally on shore, without infringing in the slightest on the actual physical control of the vessel by its master. In normal private operation, many of them are performed by shore personnel, who never see the ship.

On the other hand, the management of a vessel, including its navigation, both in port and at sea, takes place on the vessel itself. It is primarily, and by law, in the hands of the master.

The General Agency Contract reflected this demarcation. Referring to one field of activity as the "business" of the vessel, it entrusted the management of this part of the operation to the General Agent, while, on the other hand, it expressly denied to the General Agent any control over the master, by reserving to him, as an employee of the United States, "full control, responsibility and authority with respect to the navigation and management of the vessel".

There was more to this than the mere labelling of the master as "an employee of the United States". There was an allocation of power as between the United States and the General Agent and a manifestation of intent on both sides that the General Agent should not have power over the master.

Even as respects the performance of the limited services required of him, the General Agent was permitted to act only as an agent, and "not as an independent contractor" R. 337, Art. 1. Furthermore, he was permitted to act only "in accordance with such directions, orders, or regulations as the latter (United States) has prescribed, or from time to time may prescribe" (R. 337, Art. 2). Thus, both in the language of lawyers and in the language of businessmen it was made clear that the agent was not acting "on his own", but solely for the United States.

The demarcation of function as between the United States and the General Agent was further emphasized by the contractual provision that the General Agent should "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel" R. 39, Art. 3A(d). In view of this, there can be no doubt that the parties to the contract contemplated the establishment of the master and servant relationship between the United States and the crew, but not between the General Agent and the crew.

CONTROL AS INDICATED BY THE PRACTICES OF THE PARTIES TO THE CONTRACT.

In the case at bar, the evidence that the United States controlled the vessel did not consist merely of the foregoing statements of intention as to the allocation of power, and as to the relationship resulting therefrom. In addition thereto, there was evidence that, in actual practice, the

United States had and exercised physical control of its vessel to the exclusion of the General Agent. Therefore, in this case it may not be assumed, as some have said, that the parties said one thing in the General Agency Contract, and actually did another. The evidence of what the parties actually did consists, in part, of the orders and regulations issued by the United States in the course of the wartime operation of its vessels, including the *SS. Everagra* involved in this case. Some of the more important of these regulations have been bound together in a booklet which will be furnished to the court.

These orders and regulations were put in evidence by the petitioner at the insistence of the respondents. R. 93, 97, 108. There was a stipulation that all such orders and regulations should be considered as in evidence even though not read to the jury. R. 298. Actually, many of the more significant orders and regulations were read to the jury. R. 206 to R. 225.

These orders and regulations were issued pursuant to Article 2 of the General Agency Contract, wherein it was provided that the General Agent should act in "accordance with such directions, orders, or regulations as the latter (United States) has prescribed, or from time to time, may prescribe * * *." R. 337. They show not only by their content, but by their multiplicity, that the United States of America reserved to itself the actual physical operation of its vessels, and confined the General Agent to a relatively limited field of activity, described as the business of the vessel. Within that limited field the General Agent was subject to the direction of the United States with respect to the smallest details. The regulations show this conclusively. Furthermore, other evidence shows that not all of the vessel's business was entrusted to the General Agent. Some items of business were reserved to the United States.

Other items were allocated to other agents of the United States known as berth agents, over whom the General Agent had no control.

Thus, Administrative Order No. 50 provided, among other things, that the United States of America should have a Division of Operations. Administrative Order No. 50, Supplement 1, provided that in the Division of Operations there should be a Marine Operations Section which should be "responsible for manning, crewing, and stowing of vessels; for handling matters relating to personnel aboard ship, and for other activities in connection with the physical operations of vessels, with the exception of repair; for the maintenance of records and handling from an operating point of view of all casualties due to war risks and arranging for repatriation of seamen; * * *".

This was no mere provision for the supervision of vicarious operation. It fixed responsibility for "*physical operation*" of United States owned vessels directly on a section of the War Shipping Administration.

In line with the foregoing administrative provision, the War Shipping Administration discharged this responsibility.

Thus, in Operations Regulation No. 1 it defined the policy to be followed in connection with the employment of crews. This policy related to wages and working conditions and discipline, and was based upon agreements made directly between the War Shipping Administration and the unions. General Agents had no part in the making of these agreements.

If a General Agent were actually in control of the vessel and were the employer of the crew, would he not have had something to say about wages and working conditions? That is one of the prerogatives of an employer which the United States reserved to itself in actual practice.

The War Shipping Administration regulated discipline on board its ships. Thus, in Operations Regulation No. 16, it directed that when vessels were not in war theatres "the control and authority over the vessel rests solely with the master, subject to the directions of the War Shipping Administration".

The regulation and enforcement of discipline is both the prerogative and the responsibility of an employer. Here, the United States reserved this important function to itself in actual practice. But, more important to this case is the fact that the War Shipping Administration said, in effect, that the General Agent was to keep his hands off this matter because the master was subject to the directions of the War Shipping Administration, and not subject to the directions of the General Agent. Since the master, who controlled the vessel, was not subject to control by the General Agent, it follows that the General Agent did not control the vessel.

Thus was effectuated in actual practice the allocation of power referred to in the General Agency Contract when it was provided that: "The Master should be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel". R. 338, 339, Art. 3A (d).

The War Shipping Administration made provision for the prevention of accidents on board its vessels. Thus, in Operations Regulation No. 42, it directed that the master and chief officer of its vessels should see that floor plates were firmly bolted down in order to prevent injuries to members of the crew.

Again, in actual practice, the War Shipping Administration reserved to itself the performance of one of the

important functions of an employer. Moreover, its action was not mere supervision. It was actual direction.

The War Shipping Administration exercised control over the stowage of cargo. Thus, in Operations Regulation No. 46 it directed that, insofar as stowage was concerned, "* * * General Agents should go no further than to make suggestions, subject always to the master's approval or disapproval, and should be careful to avoid the direction or supervision of the stowage of cargo".

In normal private operation a shipowner is responsible for bad stowage. His responsibility arises from the fact that the master is his employee, and subject to his control. However, in Government operation, as the foregoing demonstrates, the General Agent was subordinated to the master, and explicitly barred from controlling the stowage. There could not be a clearer demonstration of the fact that in actual practice the United States physically controlled its own vessels, through control of the master, and that its General Agents did not.

It was the United States, and not the General Agent, which gave orders to the master. In this connection the General Agent acted merely as the messenger for transmitting the orders of the War Shipping Administration to the master.

Thus, in Operations Regulation No. 30, General Agents were instructed to notify masters of vessels to keep deep tank covers bolted down securely. In Operations Regulation No. 43, General Agents were directed to instruct masters of vessels to use water instead of fuel oil for ballast purposes. In Operations Regulation No. 46 General Agents were instructed to post notices on bulletin boards as to how crews should act in case they were taken prisoners of war.

One of the most important indicia of control is the giving of orders. Herein, in actual practice, the United States

gave the orders to the masters of its vessels. On the other hand, the General Agent gave no orders at all, but merely acted as a conduit for the orders of the United States, which thereby exercised full and complete control of its own vessels.

If the General Agent had been in control, the War Shipping Administration would have ordered the General Agent to bolt down covers, to use water instead of fuel oil, etc., etc. There would be no point in directing the General Agent to direct the General Agent's employees, and it would have been unnatural to couch the orders in such terms.

The United States, in actual practice, managed that part of the undertaking having to do with ship repairs and maintenance. Thus, Administrative Order No. 50 provided that there should be a Division of Maintenance and Repair which "exercises full authority and supervision over all repairs and the maintenance of vessels under the control of the War Shipping Administration in all ports in the Continental United States, Canada, and Trinidad, and discharges fully all of the functions and responsibilities of a maintenance and repair nature arising under the master repair contract * * *. In the field, the activities of this Division are directed by district managers * * * who exercise control over all ship repairs and maintenance in their respective districts, reporting directly to the Director of Maintenance and Repair Division in New York."

Furthermore, the War Shipping Administration issued regulations on this subject. Among these was Maintenance and Repair Regulation No. 1, Revised, which is printed in full at R. 359-363. This regulation provided, among other things, as follows:

> (1) that the "maintenance and repair of all vessels owned by * * * and operated for account of the

United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Maintenance & Repair Division, (an employee of the United States) who will exercise full authority and control over all ship repairs and maintenance in which the War Shipping Administration may be concerned * * *" R. 359.

(2) that, in cases where vessels "require repairs * * * involving the expenditure of not more than $10,000 in respect to any one voyage, the General Agents shall arrange for and order the performance of such repairs without prior written approval of the Local Manager, Maintenance and Repair Division". R. 360. The repairs referred to were those requested by the crew in their requisitions, which were prepared by the crew at the end of each voyage. R. 147, 156, 157.

(3) Within the limited field in which General Agents were thus authorized to act, the regulation provided further that General Agents should, among other things,

"a. Determine the repairs necessary," *i.e.*, which of the repairs requested by the crew were necessary. R. 361.

"c. Arrange with the Local Manager for drydocking and other surveys, and for inspectors to view the work when the cost of repair may exceed the prescribed limit." R. 361.

"e. Place in hand and award contracts for repairs." R. 361.

"g. Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed." R. 361.

(4) In case the repairs involved "the expenditure of more than $10,000 in respect to any one

voyage,'' the Maintenance and Repair Division of the War Shipping Administration was authorized to arrange for the repairs, to the exclusion of the General Agents. R. 362, 363.

Here, in actual practice, the United States reserved to itself the control of an important aspect of the business of its vessels. On the other hand, General Agents were restricted to a limited field of service in connection therewith. Moreover, this shows what the parties really meant when they provided in the General Agency Contract that the General Agent should, subject to instructions of the United States, "arrange for the repair of the vessels". R. 349, Art. 14. This was no general undertaking on the part of General Agents to repair vessels or to keep them in repair. It was an undertaking to attend to the business arrangements respecting repairs when *requested* to do so. In actual practice, as the Maintenance and Repair Regulations show, the only repairs which the General Agent was required or permitted to arrange for were those involving an expenditure of not over $10,000. Even as to such repairs, the General Agent had a duty to "order" repairs only when a vessel should *require—i.e., request*—repairs. This was shown not only by the foregoing regulations, but by the testimony of the assistant local manager of the Maintenance and Repair Division. R. 147, 156, 157. There is no testimony which even suggests a greater duty.

Actually, the repairs which were requested by the crew at the end of the voyage which preceded the accident amounted to over $29,000. R. 146. Thus, the matter of arranging for repairs to the *Everagra*, so far as they were needed immediately before the accident, was not respondent's concern. It was the concern solely of the War Shipping Administration.

Neither in the contract nor in the regulations was there any requirement that the General Agent should inspect vessels so that it could decide on the necessity for repairs. The General Agency Contract specifically provided that the purpose of the inspection which the General Agent should make was to inform the United States so that "the United States may satisfy itself that the vessels are being properly maintained". R. 349; Art. 14. Here, again, it was the United States which was in control. It was the United States, and not the General Agent, which decided what was proper in the way of maintenance.

It was the United States, and not the respondents, which contracted with petitioner's employer for the unloading of the *SS. Everagra*. It was the United States, and not the General Agent, which undertook by written contract to provide the petitioner and all the other stevedores with a safe boom. Defendant's Exhibit T, Part II, Section 4.

Normally, the making of contracts with stevedores is one of the most important aspects of a ship's business. But, under the General Agency Contract, the United States had the right to assign to General Agents as much or as little of the ship's business as suited the United States. R. 337. In actual practice, therefore, the United States chose not to assign to General Agents two most important items—*i.e.*, the loading and unloading and the maintenance and repair of vessels.

Nothing could show more clearly the restricted field of operations of General Agents. To say that a General Agent controlled the vessel, when he was not even permitted to sign a contract with stevedores for its unloading, or with a repair yard for repairs costing more than $10,000, borders on the absurd.

The respondent herein had nothing to do with berthing the vessel at Agwilines Pier 34, where she was at the time

of the accident. Arrangements for this were made by Moore-McCormack Lines, acting as berth agent for the United States. R. 236. Jarka Corporation, the stevedores, were appointed to do the stevedoring, not because of any relationship they bore to the petitioner herein, but by reason of arrangements for which Moore-McCormack Lines, the berth agent, was responsible. R. 237. As already indicated, there was a standing contract between the United States and Jarka Corporation. Defendant's Exhibit T.

Here, again, we have an instance where, in actual practice, the General Agent's activity was restricted even as respects the management of the business of the vessel.

It should be noted that Moore-McCormack Lines, Inc., the berth agent, was originally named as a defendant in this proceeding. The complaint alleged that Moore-McCormack Lines operated and controlled the vessel. R. 6. Petitioner did not proceed with the case against the berth agent. However, one may well ask why. The General Agent and the berth agent each managed a limited portion of ship's business. Neither managed the vessel itself. If there was no case against the berth agent worth prosecuting, neither was there one against the General Agent.

Moreover, if it should be assumed that there was a case against one, there was just as good a case against the other. Indeed, if there is any ground for distinction between them, the case against the berth agent appears to be the better, for it, and not the respondents, made the arrangements which resulted in the doing of the work which caused petitioner's injury. R. 237, 238.

The actual decision in the *Hust* case.

Petitioner relies principally on a recent decision of this court, which, actually, is not in point. This decision is *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707.

The decision in the *Hust* case was by a divided court consisting of only seven justices. It involved the rights of a seaman to recover damages under a Federal statute—the Jones Act. Mr. Justice Rutledge, who wrote the opinion, seemed to accept the conclusion of the court below that the seaman was "technically" an employee of the United States, and, therefore, not an employee of the General Agent in the traditional common law sense. On the other hand, Mr. Justice Rutledge held that, for the purpose of permitting a seaman to sue the General Agent under the Jones Act, he need not be his employee in the traditional common law sense. It was sufficient for that purpose if he were an employee of the General Agent in the special sense indicated by Congress in passing the War Shipping Administration Clarification Act. In the opinion of the court, the seaman was an employee of the General Agent in this special sense.

Neither the Jones Act nor the War Shipping Administration Clarification Act have anything to do with the case at bar. The question here is who controlled the vessel. The employment of the crew, apart from the master, is merely one of the circumstances from which an inference of control may be drawn. Moreover, the control in question is physical control in the common law sense.

The question of control was not decided in the *Hust* case. It was merely discussed. Three of the Justices, Messrs. Reed, Frankfurter and Burton, said that the General Agent was not in control, and that he was not the employer of the crew in the traditional common law sense. Two of the Justices, Messrs. Douglas and Black, came to the contrary conclusion. Mr. Justice Rutledge and Mr. Justice Murphy did not state their position in this respect, beyond indicating an acceptance of the finding of the court below that the seamen were "technically" employees of

the United States. They did not define what was meant by a "technical" employee—*i.e.*, whether he was an employee in a narrow, unreal sense or an employee who was fully embraced in the technical definition of the master-servant relationship.

THE OPINION OF A MINORITY OF THE JUSTICES IN THE *Hust* CASE.

Petitioner's argument in this court consists of little more than quotations from the foregoing opinion of Mr. Justice Douglas, which is referred to as the opinion of the court. Petitioner's Brief, 9-12. As already pointed out, it was not the opinion of the court. On the other hand, it does contain about all that can be said on petitioner's behalf. That being the case, it is necessary to examine it carefully. Such an examination will indicate that its reasoning and conclusions, especially as applied to this case, are not supportable.

It may be that, if the record in the *Hust* case had contained the evidence contained in the present record with respect to the actual practice of the parties to the contract, Mr. Justice Douglas would have noted and placed in proper perspective those portions of the General Agency Contract which reserved control to the United States and denied it to the General Agent. At least, it would not have been appropriate to say, as he did therein (328 U. S. 707, 736):

> "I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business".

In the case at bar, the evidence shows that the United States managed part of the business itself, and assigned the management of other parts of the business to the General Agent, and to a berth agent as well, both of whom were subject at all times to the direction of the United

States as to details. Furthermore, both in the General Agency Contract and in practice, the United States sharply distinguished between the management of business and the management of the vessel as a physical entity. The latter it reserved to the United States and to the United States alone.

The evidence in this case shows this so strongly that the Appellate Division and the Court of Appeals of the State of New York held *as a matter of law*, that the United States was the manager of that part of the undertaking involving possession of the vessel, and that the General Agent was not.

THE GENERAL AGENCY CONTRACT AND MR. JUSTICE DOUGLAS' ERRONEOUS CONSTRUCTION OF ITS PROVISIONS.

In arguing that the General Agent had possession of the vessel, Mr. Justice Douglas, it seems, proceeded on two main grounds. The first involved an analysis of the provisions of the General Agency Contract. The second involved a comparison of the provisions of the General Agency contract with the provisions of the contract involved in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575.

Insofar as his argument depended on an analysis of the General Agency Contract, Mr. Justice Douglas proceeded by way of five steps to his ultimate conclusion. These steps were as follows:

First. Some of the provisions of the General Agency Contract indicate that the parties intended that possession of vessels should pass to the General Agent (328 U. S. 707, 735).

Second. Other provisions of the contract indicate the contrary (328 U. S. 707, 735).

Third. The latter contractual provisions are not decisive because the law looks not to what parties say, but to what they do (328 U. S. 707, 736).

Fourth. Since what the parties say is not decisive, those portions of the contract which tend to show that they did not intend that possession should pass to the General Agent must be rejected (328 U. S. 707, 736).

Fifth. This leaves for consideration only those portions which tend to show that it was the intention that possession should pass to the General Agent (328 U. S. 707, 736).

Ergo. Possession did pass.

This argument is unsound in both the first and fourth steps.

In support of the first step of this argument, Mr. Justice Douglas relied, in part, on the following provision of the General Agency Contract.

> "Article 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States,* in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, *of such vessels as have been* or may be by the United States *assigned to and accepted by the General Agent* for that purpose."

The words emphasized in the above quotation are the words to which Mr. Justice Douglas referred particularly, as shown by the excerpts given in his opinion (328 U. S. 707, 735).

Mr. Justice Douglas, evidently, took the phrase "assigned to and accepted by the General Agent" as meaning "*delivered* to and accepted by the General Agent". (Emphasis ours.)

But, the parties to the contract did not use the word "delivered". If they had contemplated that physical control would pass to the General Agent, "deliver" would have been the natural word for them to use. Their use of the word "assigned" negatives the existence of an intent that physical possession of the vessels should be delivered.

Furthermore, the contract did not, as Mr. Justice Douglas indicated by his partial quotation from it, refer to vessels which had been "assigned to and accepted by the General Agent". The clause, as set forth in the contract, read: "assigned to and accepted by the General Agent *for that purpose*". (Emphasis ours.) As a full reading of the clause shows, the purpose referred to was that of conducting the vessel's business.

If the phrase "for that purpose" had been omitted entirely, it would have been assumed, without more, that the assignment and acceptance of vessels was for the purpose stated in the contract—*i.e.*, to conduct the vessel's business. Therefore, the only reason for adding the phrase "for that purpose" was to exclude the notion that the assignment could be for any other purpose. Thus, the meaning intended was that the assignment was *only* for the purpose of conducting the vessel's business.

Delivery of physical control of a vessel is not necessary for the purpose of conducting a vessel's business. Mr. Justice Douglas conceded in his opinion that there was an essential difference between the two, for he said (328 U. S. 707, 737):

> "The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control."

If, as the contract indicates, the vessels were to be assigned only for the purpose of conducting the vessel's

business, it follows that the parties did not contemplate physical delivery when they used the word "assigned". Delivery was not necessary to the accomplishment of the purpose which the parties had in mind. They could not, therefore, have intended delivery.

An assignment of a vessel, but only for the purpose of conducting a vessel's business, is no more a delivery of a vessel than an assignment of a judge for the conduct of judicial business is a delivery of the judge. The acceptance of a vessel so assigned is not the acceptance of the vessel itself. It is an acceptance of the assignment.

Evidently, it was partly by reason of failing to note the phrase "for that purpose" at the end of Article 2 of the contract that Mr. Justice Douglas was misled into concluding that this case was not one where the Agent was hired only for the purpose of attending to the vessel's business.

The mistake may have been caused also by misapprehension of the meaning of such terms as "pro hac vice" and "demise". For example, Mr. Justice Douglas at one portion of his opinion said (328 U. S. 707, 734):

> "A charterer who obtains exclusive possession and management of the vessel from the owner is owner pro hac vice, and subject to the responsibilities of ownership for the duration of the charter period. *Reed* v. *United States*, 11 Wall. 591, 600-601; *Leary* v. *United States*, 14 Wall. 607, 610; *United States* v. *Shea*, 152 U. S. 178."

At another portion of the opinion he said (328 U. S. 707, 737):

> "A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 F. 878."

At another portion of the opinion he said (328 U. S. 707, 738):

> "These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice.*"

But, the term "owner *pro hac vice*" is applicable *only* to one to whom a vessel has been demised. Demise means the transfer of possession.

Thus, in *United States* v. *Shea,* 152 U. S. 178, at 189, the court said:

> "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control."

In *Hills* v. *Leeds,* 149 F. 878, at 880, the court said:

> "This contract must be held to be a contract of lending and hiring, and not a mere contract of service. By it there was a demise of the vessel; her possession, command, and control passed from the owner to the hirer or charterer. The charterer became the *owner for the voyage.*" (Emphasis ours.)

Owner *pro hac vice* means owner for this occasion.

In *Reed* v. *United States,* 78 U. S. 591, at 601, the court said:

> "Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command and navigation of the ship, is the agent of the general owner and the mariners are regarded as in his employment and he is responsible for their conduct." "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view

can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

In *Pacific Improvement Company* v. *Schubach-Hamilton S. S. Co.*, 214 F. 854, at 859, it was said:

> "The presumption is that the contract was one of affreightment merely, and the contrary must clearly be made to appear before it will be held to constitute a demise."

Thus, if Mr. Justice Douglas was correct in saying there was no demise, he was incorrect in concluding that the General Agent had been granted possession and control of the vessel. Furthermore, if he was correct in concluding that the General Agent was given possession and control of the vessel, he was incorrect in saying there was no demise. There is no middle ground, unless such terms as "owner pro hac vice" and "demise" are used to denote a novel relationship unheard of in any of the cases already decided.

Mr. Justice Douglas also relied on the following provisions of the contract:

> "Article 11. (a) The United States shall have the right to *terminate* this *Agreement* at any time as to any and all vessels assigned to the General Agent and *to assume control forthwith of* any and all said *vessels* upon fifteen (15) days' written or telegraphic notice."
>
> "Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, *all vessels and other*

property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall *be immediately turned over to the United States,* at times and places to be fixed by the United States, * * *"

The words italicized in the above quotation are the words to which Mr. Justice Douglas referred particularly, as shown by the excerpts given in his opinion. (328 U. S. 707, 734, 735).

The real meaning of Articles 11 and 12 was misunderstood by Mr. Justice Douglas. Anyone unfamiliar with the shipping business would be likely to make the same mistake.

In understanding these clauses it is necessary to have in mind that there are occasions when vessels do not have any masters at all. Indeed, there are times when they do not have crews. The latter occurs when they are in laid-up status. The General Agency contract, therefore, contemplated that, when this should occur, General Agents would have temporary custody of vessels. Accordingly, the contract provided that, if any vessels should be in the "custody" of the General Agent at the time of the termination of the contract, they should be turned over to the United States, which would then assume control. Such provisions, on their face, had no reference to a vessel which was commanded by a master who, as "an employee of the United States", had and exercised "full control, responsibility and authority with respect to the navigation and management of the vessel". As to such a vessel, there was no need for such provision because the vessel was already in the control of the United States.

In further support of the conclusion that possession passed to the General Agent, the opinion in question goes

on to say that "Management of the vessels also is granted to the General Agent". (328 U. S. 707, 735).

The only parts of the contract which the opinion cites in support of the conclusion that management of vessels was granted to the General Agent are those parts which define the various business services which the General Agent agreed to perform. As already explained, these do not involve control or management of vessels. They involve the making of contracts with shore contractors who agree to furnish the United States with equipment, food, and supplies, and agree to perform for the United States the functions of maintenance. The General Agent's usefulness lay in his knowledge of the shore market. Likewise, with respect to personnel, his usefulness lay in knowledge of the shore market. Therefore, he was hired to "procure" labor in the market place—i.e., the Union Hall. It was likewise with respect to the General Agent's undertaking to "arrange for the repairs of vessels". R. 349, Article 14. The very words import the making of contracts.

General Agents did not, as a rule, have storehouses filled with equipment, food, or supplies. Most of them did not employ men to do maintenance work, the nearest analogy to which, in terms familiar to landlubbers, is the periodical greasing and oiling of an automobile. They had no shipyards for repairing ships. Neither did they have a supply of seamen under contract to go on vessels wherever they were sent. But, they did know where to buy these things and to find the right persons to perform these services at fair prices. And that is exactly what they undertook to do. It was "business" of a vessel, but not management of a vessel.

Other articles of the contract, not referred to in Mr. Justice Douglas' opinion, show this conclusively. Thus, in Article 15 it was provided that the United States might

have the advantage of "any existing or future contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessel owned or operated by the General Agent."

It is to be noted, in passing, that the parties herein demonstrated that there was a distinction between vessels covered by the General Agency Contract, as to which the General Agent was not the physical operator, and vessels not covered by the General Agency Contract, as to which the General Agent might be either the owner or the physical operator.

In Article 16 (c) it was provided that "In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall * * *". R. 351.

In Article 16 (d) it was provided that "The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of * * *". R. 351.

Thus, by its context, the contract shows that all that the General Agent undertook to do was to perform certain services for the United States. Those services consisted mainly of making business arrangements between the United States and other persons and interests. Although the General Agent might, if he wished, load and unload and repair a ship, the General Agency Contract did not

require him to do so. If the agent did such work, it would be because of some other and entirely different contract.

Evidently, Clause 3 A. d, R. 338, referred to above, which specifically reserved the management of the vessel to the master, an employee of the United States, was overlooked. At least, it is not referred to at any place in the entire opinion. If the parties intended to grant management of vessels to the General Agent, this clause was a rather strange way of putting it.

In the light of the foregoing, the first step in Mr. Justice Douglas' argument is without support in the provisions of the General Agency Contract.

The fourth step in the argument is unsound because it involves a non-sequitur.

Undoubtedly, as Mr. Justice Douglas says, the declarations of parties as to the nature of the relationship they intend to create is not decisive of the actual relationship which results. But it does not follow that, because such declarations are not decisive, they are to be rejected. Mr. Justice Douglas' opinion rejects them. At the same time, other provisions of the contract are emphasized. However, if selected contractual provisions are to be rejected merely because they are not decisive, it will be difficult to stop until the contract as a whole is rejected on the ground that it merely represents what the parties said, rather than what they did. There is no reasonable theory which will justify picking and choosing from among the many provisions of the contract only such expressions of intention as will support a given thesis.

The true rule is that the intendment of the contract must be derived from a construction of *all* its provisions. Those provisions include, primarily, statements of intention with respect to the allocation of powers and duties. Secondarily, there are statements of the nature of the relationship in-

tended. Neither are decisive of the relationship which actually existed. Ultimately, that may depend on what the parties did in actual practice.

Roberts v. *U. S. S. B. Emergency Fleet Corp.*, 240 N. Y. 474.

However, in the absence of any evidence that the parties departed in actual practice from the allocation of powers set forth in the agreement, the allocation of powers in the agreement is decisive of the nature of the relationship resulting. There is nothing else on which to depend. Moreover, statements with respect to the nature of the relationship intended, while not decisive, are relevant. It is a reasonable inference that the parties intend to allocate power in accordance with the necessities of the relationship which they say they intend. In case of ambiguity in the words which allocate power, their true meaning can be ascertained by reference to the words which describe the relationship intended.

In the case at bar the statement of intention with respect to the nature of the relationship between the United States and the master, coupled with those showing the intention with respect to the allocation of power, shows conclusively that the General Agent was not in control. When it was provided that the master "shall be an Agent and employee of the United States, and shall have and exercise full control, responsibility, and authority with respect to the navigation and management of the vessel" the parties were not merely resorting to the unnecessary trouble of defining a master's function. Instead, they were allocating power as between the United States and the General Agent. The words were used to foreclose the agent from physical control of the vessel.

If the contract had said that the General Agent should have no power to direct or control the master, there could not have been any question that control was reserved to the United States. Actually, the contract said the equivalent.

In the first place, it placed control in the hands of the master, thus depriving the General Agent of control, unless the General Agent controlled the master. In the second place, it negatived an intent that the General Agent should control the master, by describing the master's control as full—*i. e.*, exclusive—and by describing him as an employee of the United States—*i. c.*, not of the General Agent.

Mr. Justice Douglas' opinion, however, rejects *in toto* the declarations of the parties as to the relationship intended. It ignores their declarations with respect to the allocation of power.

THE CASE OF *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 AND MR. JUSTICE DOUGLAS' ERRONEOUS APPLICATION OF IT.

The second argument of Mr. Justice Douglas involves an application of the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575. This argument proceeded by way of three steps to its ultimate conclusion. The steps were as follows:

First. In the *Brady* case the "managing agent" was referred to as an "operator". (328 U. S. 707, 737).

Second. Any agent, such as the respondents, who contracts with the United States to perform business services respecting a United States-owned vessel is to be identified with the "operator" in the *Brady* case, and also referred to as an "operator". This means that the functions per-

formed by the "operator" in the *Brady* case were the same as those performed by the "operator" in the *Hust* case. (328 U. S. 707, 737).

Third. The "operator" in the *Brady* case had physical possession of the vessel. (328 U. S. 707, 737).

Ergo: It follows that the "operator" herein had physical possession.

The second and third steps of this argument are unsound.

The second step is unsound because it assumes the conclusion which the argument is designed to prove. That conclusion is assumed when the General Agent is referred to as an "operator". It may be granted that, if it be assumed that the General Agent was an "operator", it will be difficult for anyone, as Mr. Justice Douglas found it to be, "to see how the functions of the private operator were in any way changed under this agreement * * *". (328 U. S. 707, 737). The very word "operator" is frequently used to denote physical operation and control.

To paraphrase the words of Mr. Justice Douglas' opinion we may say: "If a court could, by the choice of a label, determine these questions of responsibility to third persons, the problem would be simple". (328 U. S. 707, 736).

It is true that labels do not solve legal or factual questions. Labelling the General Agent as an "operator" merely begs the question whether he was in control or not.

The third step is unsound because it assumes that this court held in the *Brady* case that the "managing agent" involved therein was an "operator"—i.e., was in control of the vessel as such and employed the crew. The fact is that this court expressly refused to pass on this question, although counsel requested it.

One of the points of the respondent in the *Brady* case was entitled as follows:

> "Roosevelt Steamship Company was not the employer of the negligent member of the crew who committed the tort."

As to this, Mr. Justice Douglas, who wrote the opinion in the *Brady* case, said (317 U. S. 575, at 585):

> "Whether a cause of action against respondent has been established is, of course, a different question, as the issues involved in Quinn *v.* Southgate Nelson Corp., *supra*, indicate. The Circuit Court of Appeals did not reach that question. Accordingly we reverse the judgment and remand the cause to it."

After the decision in the *Brady* case, the Circuit Court of Appeals decided that a cause of action had been established against Roosevelt Steamship Company. *Decision unreported. See p. 129 of transcript of record filed in connection with Roosevelt Steamship Company's petition for certiorari, which was denied at 319 U. S. 763.* The Circuit Court's decision was made on the authority of a previous decision of the court—*i.e., Quinn* v. *Southgate Nelson Corporation,* 121 F. (2) 190, Cert. Den. 314 U. S. 682.

Thereafter, Roosevelt Steamship Company filed a petition for certiorari asking this court to hear and determine the following questions:

> 1. What is the status, as respects the employment of the crew of a United States owned vessel, of a person or a corporation who agrees, as agent for the United States, to perform services for the United States in the operation of the vessel, whether he be a "Managing Agent", as in the contract involved in the case at bar, or a "General Agent", as in the modified contract currently used by the War Shipping Administration?

2. Is such status of the agent a matter which can and should be stated as a matter of law, or is such status a factual matter, which must be permitted to depend for solution on a finding of fact in each case, with accompanying variation in the result from case to case?

3. If such status of the agent can and should be stated as a matter of law, is the agent the sole employer of the crew or is the United States the sole employer of the crew?"

The petition for certiorari in the *Brady* case, accordingly, set forth that the managing agent was not the "operator" in the sense that it controlled the vessel and employed the crew, and that the inferences to be drawn from provisions of the contract requiring it to "man" and "operate" the vessel were nullified by other provisions of the contract showing, on a reading of the contract as a whole, that the managing agent was required merely to perform certain business services, including the furnishing (but not the employing) of the crew.

This petition was denied, 319 U. S. 763.

In view of the foregoing, it is incorrect to construe the *Brady* case as a decision by this court that the managing agent in that case employed the crew or controlled the vessel. It is also incorrect to refer to the agent in either the *Brady* case or in this case as an "operator", if one means to imply by that term that he was an operator in the usual commercial sense. The matter of the agent's status with respect to crew and vessel was expressly and deliberately avoided by the court.

The holding of the *Brady* case was simply that, *if the managing agent was an "operator" in the usual commercial sense, and, so, was liable for the tort which had occurred,* he was not immunized by the Suits in Admiralty Act merely because he was acting for the United States.

Neither the *Brady* case, nor the denial of certiorari, decided anything with respect to the substantive rights of the public, including seamen, against the managing agent. They merely served to leave unresolved the question which had existed for years as to the status of the managing agent and its consequent liability, if any, to the general public and members of the crew. That doubt had arisen long before the *Brady* case was ever heard of in connection with the decision of the following four cases:

Roberts v. *U. S. S. B. Emergency Fleet Corp.*, 240 N. Y. 474;

City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.*, 84 Cal. App. 413 (1927); 1927 A. M. C. 1781;

Quinn v. *Southgate Nelson Corp.*, 121 F. (2) 190, (1941), Cert. Den. 314 U. S. 682;

New York & Cuba Mail Steamship Co. v. *United States*, 12 F. (2) 348 (1926); Cert. Den. 273 U. S. 719.

The *Roberts* case decided that the contractual provisions which required the agent to man and operate the vessels did not, necessarily, mean that the agent was the operator in the sense that he controlled the vessel and employed the crew. The *City of Los Angeles* case held squarely that the managing agent was not the "operator" in this sense. The *New York & Cuba Mail Steamship Co.* case strongly implied that he was not. It was only the *Quinn* case which held to the contrary.

The question with respect to the status of an agent, left unresolved by the denial of the petition for certiorari in the *Brady* case, thus persisted. It has persisted down to the present time. It is the question involved in this case. Here,

however, the text of the agreement is different from that in the *Brady* case and the other cases referred to above. It goes much further than the old agreements in making clear that the agent was not in control of the vessel. Furthermore, there is in this case other evidence which was not in the *Brady* case or even in the *Hust* case as to the actions and intentions of the two parties to the agreement, which emphasizes the fact that the agent was not in control.

Therefore, it is not consistent with good reason to make the decision of this question depend in any respect on an assumption as to what was the status of the managing agent in the *Brady* case. Such questions were not decided by declining to decide them and, then, assuming that they were decided.

It offends reason doubly when an attempt is made to justify the assumption by referring to the General Agency contract as involving a mere change in form. This assumes that both contracts provided for the same kind of operation—*i.e.*, operation by a private operator. As already demonstrated, this court declined, on every occasion when it had an opportunity, to declare whether peace time operation was private operation or operation by the United States.

Nevertheless, if it should be thought desirable that the issue in this case should also depend on assumptions, rather than proof, then why not assume that the operation involved in the Brady case was operation by the United States? An assumption of governmental operation is, at least, as valid as an assumption of private operation. On the basis of such an assumption those provisions of the General Agency Contract which show operation by the United States would not then appear as changes designed to disguise the true nature of the operation, but as changes designed to make doubly sure that some courts would not again misconstrue the actual intent of the parties.

Neither private operation nor Governmental operation forms an indispensable pattern for the operation of Government-owned ships. The Suits in Admiralty Act contemplated both kinds of operation—*i.e.* operation *by* the United States and operation *for* the United States. 46 U. S. C. 741. Thus, in all cases it is a question as to which method of operation was chosen by the United States.

Actually, if one is to make any assumption at all, there is more to recommend the view that the operation in the Brady case was operation by the United States. The great weight of authority of the decided cases supports this view. In addition to the cases already referred to, see the following:

Cox v. *Lykes Bros. and United States Shipping Board Emergency Fleet Corporation*, 237 N. Y. 376 at 383;

United States Shipping Board Emergency Fleet Corporation v. *O'Shea*, 5 Fed. (2d) 123;

The Panola, 1925 A. M. C. 1173 (C. C. A., 2nd Cir.);

Florida, etc. Co. v. *U. S. Shipping Board Emergency Fleet Corporation*, 300 F. 169; reversed on other grounds after rehearing, 3 F. (2nd) 314;

Mallory S. S. Co. v. *Garfield*, 10 Fed. (2nd) 664 (C. C. A., 2nd Circuit);

The Hudson, 1925 A. M. C. 106, New York Supreme Court, affirmed without opinion, 214 App. Div. 717.

In view of the foregoing, if one assumes, as Mr. Justice Douglas appears to have done, that the operation involved in the Brady case was operation by a private operator, and then uses this assumption as a point of reference for judg-

ing the effect of the General Agency Agreement, it is tantamount to a refusal to permit parties to make such contracts as they intended.

It would be better to avoid assumptions entirely, and to ascertain the facts by a trial. That is the way in which the facts with respect to wartime operation were ascertained in the case at bar. If the facts in the case of the old peacetime operation are needed in order to decide the question of the present wartime operation, they should be ascertained in the same way. However, they are not contained in the present record.

CERTAIN COLLATERAL MATTERS REFERRED TO BY MR. JUSTICE DOUGLAS IN HIS OPINION IN THE HUST CASE.

Mr. Justice Douglas' opinion refers to two "collateral phases" of the General Agency Contract. It is said that they suggest that the General Agent performed "managerial functions". The first of these provisions is contained in Article 5, where, with respect to vessels allocated before February 25, 1942, it was provided that (R. 342):

> "• • • compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942."

The second provision is Article 7, wherein it was provided that the United States shall reimburse the General Agent,

> "for all crew expenditures • • • in connection with the vessels hereunder, including, without limitation,

all disbursements for or on account of * * * damages or compensation for death or personal injury or illness * * * any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits of said plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise" (R. 344).

The quoted portions of Article 5 are inapplicable in this case. The *SS. Everagra* was not allocated until May 27, 1943.

Irrespective of this, it is difficult to see how the retention of the Maritime Commission's standards in fixing General Agents' compensation can suggest that the General Agent controlled or managed the vessel. Of course, if one assumes that the only method of compensation followed by the Maritime Commission was compensation in respect of operation by private operators, rather than operation by the United States, such an inference is remotely possible. But, here, again, there is the same unwarranted assumption that operation of Government vessels during peacetime was exclusively operation by private companies. Moreover, Article 5 shows by its context that operation under the Maritime Commission was not exclusively private operation. It refers not only to compensation payable in the case of bareboat charters, but in case of "commitments".

Likewise, it is difficult to see how Article 7 can show that the General Agent was the manager of a vessel. The disbursement of money for the United States in payment of its obligations is no more the performance of a managerial

function than a bank's payment from a checking account on the order of its depositor. The General Agent's function was exactly the same. This appears from the fact that the expenditures in question were referred to as "disbursements". The primary meaning of that word is the paying out of Government money. Article 7 provides that the United States "may advance moneys to the General Agent to provide for disbursements hereunder * * *" R. 345.

Moreover, there is nothing in the General Agency contract indicating that the parties contemplated that the General Agent was to make the payments in question because he was an employer and so was obliged to make them. The only words which even faintly indicate that the General Agent might be required to make any of these payments in a capacity other than as a disbursing officer of Government moneys was the provision with respect to Social Security taxes, wherein reference was made to payments which the General Agent might be required to make as "agent or otherwise". Irrespective of what the meaning of this provision was when the contract was originally drawn, it is clear that, as of the time when the Steamship *Everagra* was allocated to the respondents, there was no requirement that the respondents should pay Social Security taxes in any capacity other than as an agent. This appears from Internal Revenue Code, Title 26, §1426, (i) which took effect on March 24, 1943, two months before the *SS. Everagra* was allocated to the respondents. Therein it was provided that the Social Security Act should apply to

> "* * * service * * * on or in connection with any vessel by an officer or member of the crew as an employee of the United States employed through the War Shipping Administration, or, in respect of such service performed before February

> 11, 1942, the United States Maritime Commission * * *. The Administrator, War Shipping Administration, and the United States Maritime Commission, and their agents or persons acting on their behalf or for their account, may, for convenience of administration, make payments of the tax* * *".

Thus, Congress recognized, for the purposes of the Social Security Act, that seamen employed on Government-owned vessels, both before and after the war, were employees of the United States, and not of the agents.

Mr. Justice Douglas' final conclusion was that the General Agent performed all of the managerial functions relating to the undertaking, and that this constituted control of the vessel. Obviously, this went too far. The performance of managerial functions, even when it includes the function of directing the master of a vessel, does not, necessarily, constitute control of the vessel. Whether it does or does not depends upon whether the managerial functions are performed vicariously or not. In some cases where managerial functions are performed by an agent, the principal is in control, and *the agent is not.*

See

> *Restatement of Law of Agency,* §220; Comment on Sub-section 1-A; §358, Comment on Subsection (1) a.

Mr. Justice Douglas' conclusion was also erroneous because the premise was incorrect. The General Agent did not perform *all* managerial functions. The General Agent was limited to the performance of managerial functions relating to the business of the vessel as distinguished from managerial functions relating to the vessel itself. And he performed only *some* of the managerial functions relating

to the business itself. As already noted, the Berth Agent performed some of them. So did the War Shipping Administration itself.

After all, the claim that the General Agent physically controlled the vessel, when it was being used by the United States as an instrument of war, is violative of common understanding. The "undertaking" with which we are concerned herein was the war with Germany. The war was the public undertaking of the United States, not the private undertaking of the respondents.

Congress showed that it clearly understood this when it referred to seamen employed on its vessels as employees of the United States, and made the United States liable as an actual, not a technical, employer for the payment of Social Security taxes. When Congress stated the reality so explicitly, a court should not be at pains to obscure it.

Three Justices of this court have already so declared.

Petitioner's Brief.

As already indicated, petitioner relies for the most part on excerpts from the opinion of Mr. Justice Douglas in the *Hust* case. However, he also refers to certain provisions of the General Agency contract and the regulations made thereunder, not referred to in that opinion, which, it is claimed, show that the General Agent had physical control of the vessel.

It will be found that petitioner misconstrues the meaning of these provisions and that the reason for this is that he makes no distinction between the physical phase and the business phase of the operation of vessels. As already indicated, this distinction was the fundamental concept of the General Agency contract.

In an effort to support an inference that, notwithstanding the clear provisions of the contract, the General Agent was in physical control of the *SS. Everagra,* petitioner refers to a number of isolated phrases which have been culled from the General Agency contract and from the maze of orders and regulations issued pursuant to it. Thus, on page 20 of petitioner's brief reference is made to Article 16 of the General Agency contract, wherein the United States agreed to indemnify the General Agent against claims for injury to persons or property "arising out of, or in any way connected with, operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder." Petitioner argues that this shows that the contract contemplated physical operation of the vessels by the General Agent. The inference is unfounded.

The operation referred to in Article 16 is operation by the United States. The General Agent, without being in control of the vessel, can be liable for injury to persons or property "arising out of, or in any way connected with, operation or use of said vessels" by the United States. It was with regard to such liabilities, among others, that the parties were contracting.

Thus, a General Agent who, in the performance of his obligation under the contract to supply a vessel, should contract with someone to supply it with defective materials or improper food, which might lead thereafter during the operation of the vessel by the United States to injury either to crew or to non-members of the crew, would undoubtedly be liable for his negligent act. In Article 16 of the United States has contracted to indemnify the General Agent against such claims, but, that is not to say that the United States has indicated by such provision that the General Agent was to control the physical operation of its vessels.

In the case at bar, we are not concerned with any act of a General Agent. The liability claimed against the General Agent is that he failed to act, having an alleged duty to the petitioner to do so.

Petitioner's brief refers on page 21 to a letter written by the War Shipping Administration to General Agents, dated December 4, 1943. This letter refers to "repairs on vessels operated by your company for account of War Shipping Administration." This, argues the petitioner, is another evidentiary item showing that the respondents, as General Agents, were in charge of the physical operation of the vessel. Here, again, the inference is unfounded. The operation referred to is the business phase of the total operation. The subject of the letter was maintenance and repair regulations. These have to do with the "arrangements" for repairs which are confided to the care of the General Agent, pursuant to the contract.

On pages 21 and 22 of petitioner's brief, he refers to Regulation No. 59, dated May 31, 1943. Here, the phraseology to which petitioner calls attention is: "All vessels assigned and delivered for operation under General Agency Agreement as of May 1, 1943". This statement is wholly consistent with the underlying concept of the General Agency Agreement as heretofore set forth. Pursuant to that concept, vessels were assigned and delivered for operation. However, they were *delivered* to the captain of the vessel for physical operation. They were *assigned* to the General Agent so far as concerns the business phases of operation.

On page 22 of petitioner's brief, reference is made to War Shipping Administration Directive No. 1, in which it is stated that masters of vessels have been instructed to report breaches of discipline to the "operating agent" of

the War Shipping Administration. Here, again, the plaintiff fails to distinguish between the physical phase of operation and the business phase of operation.

So far as concerns disciplinary matters, the General Agent was the proper one to whom such complaints as to discipline should be referred. The General Agent was charged with the duty of procuring crews. It was essential that the General Agent, in the performance of such duty, should be acquainted with the records of those seamen whose records were bad. But, that is not to say that it was ever the intention of the United States or the General Agents that the General Agents should have control of the actual physical operation of vessels.

On page 24 of petitioner's brief, reference is made to Directive No. 1, issued on October 8, 1942, wherein General Agents are required to place a copy of a certain letter "in the hands of all masters and officers in your employ."

Obviously, the writer of Directive No. 1 was not attempting to change the definite provisions of the General Agency contract when he referred to masters as being in the employ of General Agents. Neither was he attempting to contradict the intendments of the contractual provisions respecting the "procurement" and "engagement" of officers. The phraseology is that of a shipping man to whom there seemed no necessity for the purpose in hand of preserving the distinction observed in the contract between the physical phase of operation and the business phase of operation.

On page 25 of his brief petitioner refers to Operations Regulation No. 4, wherein it is provided that General Agents shall assign to new vessels a Master, Chief Mate, Chief Engineer, and First Assistant Engineer.

Plaintiff says that "assign" means "hire" and that this modifies the contract.

"Assign" does not mean "hire". The General Agency contract requires the General Agent only to procure the officers for engagement by the master. Assignment refers to their being told to proceed on particular vessels.

On page 28 of petitioners' brief, reference is made to Plaintiff's Exhibit 8, wherein General Agents are required to supervise to completion all maintenance and insurance repairs. This, says the plaintiff, shows that General Agents had a substantial measure of control over vessels.

It shows nothing of the kind. Supervision of maintenance and insurance repairs means simply that the General Agent has to see that the repair yards do their work in accordance with their contracts with the United States. This is part of the business phase of operation.

It is in connection with the construction of the meaning of much of the foregoing data that the Appellate Division's reversal on questions of fact has particular relevance. *Supplemental additional papers to the Court of Appeals*, page 6. It was the Appellate Division's function to decide, as a question of fact, the actual meaning of these writings on which the petitioner relies. The Appellate Division found as a fact that they did not spell control.

Respondents' position with respect to the actual decision in the *Hust* case is that it is not in any respect determinative of the issue in the case at bar. For that reason respondents will not have any occasion in this brief to show that the decision made by only four justices in a court consisting of seven was unsound. If it should be thought that the point decided in the *Hust* case as to crew members has any bearing on the issues involved in this case, which concerns strangers respondents' position is that the dissenting opinion written by Mr. Justice Reed, and concurred in by Mr. Justice Frankfurter and Mr. Justice Bur-

ton, correctly stated the law. In that event, petitioner asks leave to file an additional brief dealing with that question, in which respondent will show that the decision of Mr. Justice Rutledge is based upon a misconception as to the nature of the operation of the Government-owned ships involved in the *Brady* case and, generally, before the war.

Conclusion.

The order of the Court of Appeals should be affirmed.

Respectfully submitted,

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